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Supreme Court of the United States.

No. 149. October Term, 1900.

JOHN A. McDONALD, Plaintiff in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH.

Statement of the Case.

The plaintiff in error was indicted under Pub. Sts. of Mass., c. 204, §§ 1 and 2, and on Aug. 9, 1898, was found guilty in the Superior Court on four counts, two of which charged him with forging orders of money, and two with uttering the same, knowing them to be forged.

The indictment also alleged, and the jury found, that in April, 1890, he was convicted of perjury in Massachusetts, sentenced therefor and committed in pursuance thereof to the State Prison for three years; also that in January, 1894, he was convicted of obtaining money by false pretences in New Hampshire, sentenced therefor and committed in pursuance thereof to the State Prison of that State for four years. Upon this finding of the jury he was, in accordance with Mass. St. 1887, c. 435, adjudged to be an habitual criminal, and sentenced and committed to the State Prison for the term of twenty-five years.

The statute is as follows: —

"AN ACT TO PROVIDE FOR THE PUNISHMENT OF HABITUAL CRIMINALS.

"SECTION 1. Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for twenty-five years: *provided, however*, that if the person so convicted shall show to the satisfaction of the court before which such conviction was had that he was released from imprisonment upon either of said sentences, upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this act.

"SECTION 2. When it shall appear to the governor and council that any person sentenced to the state prison as an habitual criminal has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such conditions as they deem best; and they may revoke said permit at any time previous to its expiration. The violation by the holder of a permit, granted as aforesaid, of any of the terms or conditions of such permit, or the violation of any of the laws of this Commonwealth, shall of itself make void said permit.

"SECTION 3. When any permit granted under the provisions of the preceding section has been revoked, or has become void as aforesaid, the governor shall issue his warrant authorizing the arrest of the holder of said permit and his return to said state prison. Said warrant may be served by any officer authorized to serve criminal process in any county in this Commonwealth. The holder of said permit, when returned to said state prison as aforesaid, shall be detained therein according to the terms of his original sentence; and in computing the period of his confinement the time between his release upon said permit and his return to the state prison shall not be taken to be any part of the term of the sentence."

The plaintiff in error at the trial did not object to any of the proceedings nor take any exceptions. But soon after his conviction he sued a writ of error out of the Supreme Judicial Court of Massachusetts, to reverse the judgment of the Superior Court, on account of certain alleged errors of law and of fact in the proceedings of that court.

On May 18, 1899, the Supreme Judicial Court affirmed the judgment of the Superior Court, and the case comes to this court on error.

First Assignment.

"The court erred in such judgment against the petitioner because the indictment charges the defendant with the commission of a crime punishable by the laws of another State and which was committed in another State, and attempts to embrace within its provisions the jurisdiction of another State, and is in conflict with the provisions of the Constitution of the United States and its Amendments, — that is, Article 14 of its Amendments. The court invaded the prisoner's constitutional rights when it assumed as extra-territorial jursidiction and sentenced him to twenty-five years as an habitual criminal for a crime committed in New Hampshire. That the law under which the plaintiff was sentenced was unconstitutional, inasmuch as its enactment was contrary to the provisions of Article 3, section 2, United States Constitution, holds that all crimes except in cases of impeachment shall be held in the States where crimes are committed; and the court erred in assuming jurisdiction of a crime committed in another State, and such action was unconstitutional."

Second Assignment.

"That any statute allowing the government to make bad character a part of its original case is unconstitutional and void and oppressive, because it infringes upon certain inalienable rights of persons charged with crime. Such rights are guaranteed to every defendant by the United States Constitution and its Amendments, which guarantee a fair and impartial trial to persons charged with crimes."

Third Assignment.

"The crime of being an habitual criminal was unknown to the common law and also to the statute law prior to 1887. It is a creation of statute, and when the statute was passed allowing joinder of offences not permissible at common law there was no such crime known as that of an habitual criminal, and consequently there is nowhere in the law, statutory or otherwise, any authority permitting the joinder of an habitual-criminal count to a count for any other felony, and the misjoinder is manifest, and the trial was therefore irregular."

These assignments are based upon an entire misconception by the plaintiff in error of the terms, spirit and purport of the statute. It does not in terms nor by intendment make it a criminal offence in Massachusetts to have committed a crime in New Hampshire, nor to have committed a crime in Massachusetts (upon which he has already been tried, convicted and sentenced) prior to the commission of another crime. Nor does it authorize an indictment against a man for such prior crimes, convictions and sentences.

The plaintiff in error seems to suppose that he was indicted for and convicted of three crimes. Such was not the case. The statute was enacted for the purpose of authorizing the court to increase the sentence of a convict who is shown to have been twice previously convicted. The question of sentence is always one peculiarly dependent upon previous character. Every civilized community has from time immemorial wisely provided gradations of punishment, dependent upon the behavior of a man previous to the commission of the crime for which he stands convict.

The term "habitual criminal" is not employed to describe a crime, but a condition. It is descriptive of the character of a prisoner to be sentenced, and nothing more. In other words, the statute directs that the court shall, upon information that a convict has been twice previously sentenced, impose a longer sentence for the crime for which he stands convict, in consequence of that fact.

The fact of prior convictions must be found by the jury, and the court may not enter judgment without such finding by them.

If it were true that the plaintiff in error had been convicted and was now imprisoned in Massachusetts for an offence committed in New Hampshire, the defendant in error would at once concede that the proceedings in its Superior Court ought to be quashed, for it admits that it has no jurisdiction over offences committed outside of its territorial limits. The fact is, however, that he was not tried for the offence of obtaining money by false pretences in New Hampshire in 1894, nor for the offence of perjury committed in Massachusetts in 1890, but only for the offences of forging and uttering checks in Massachusetts in July, 1898.

The statute of 1887, c. 435, does not authorize trial, conviction or sentence for offences committed outside the limits of the State of Massachusetts, but provides merely for the punishment of certain persons "upon conviction of a felony committed in this State after the passage of this act." Persons convicted of felony who have been twice convicted and imprisoned before for crimes punishable by imprisonment for three years are deemed to be habitual criminals, and punished by imprisonment in the State Prison for a term of twenty-five years. There is nothing in the act itself or in the title thereof to suggest that it authorizes a trial for offences committed beyond the jurisdiction of the State. It is simply an act in furtherance of a scheme for punishing old offenders, which has been in force in Massachusetts since 1804.

Commonwealth v. *Richardson*, 175 Mass. 202, 205.

The plaintiff in error was not tried nor convicted for any offence except the offences of forging and uttering checks in Massachusetts. It is true that allegations in the indictment set forth that he had committed crimes in Massachusetts and in New Hampshire, and that he had been convicted and imprisoned therefor. But those allegations went, neither to charge him with another crime nor to prove him guilty of forging and uttering, but to solely aggravate his punishment in case he were found guilty of forging and uttering.

They were inserted in the indictment because both the common law and Article 12 of the Declaration of Rights of Massachusetts protect a person accused of crime, and prevent the State from confronting him at his trial with charges not fully and plainly, substantially and formally, described to him in the indictment. But, if the plaintiff in error had been acquitted on the counts for forging and uttering, he could not have been convicted as an habitual criminal.

In *Commonwealth* v. *Walker*, 163 Mass. 226, it was held that the allegations in the indictment of former conviction and sentence were necessary if evidence was to be introduced with a view of proving the defendant an habitual criminal, and that the words of presentment before such allegations did not denote the beginning of an habitual criminal count, but might be rejected as surplusage.

There is, therefore, no misjoinder of counts in the indictment, as the plaintiff alleges in his third assignment of errors. Nor can it be said that the insertion in the indictment of the allegations as to former convictions violated any provisions of the Fourteenth Amendment. Those allegations were made, not to abridge the privileges and immunities of the plaintiff in error as a citizen of the United States, but to protect them; not to deprive him of his liberty without due process of law, but to ensure to him all the benefits of a trial by due process of law. They were not made and do not go to prove him guilty of forging and uttering checks, any more than one count for forging a check went to prove him guilty on a count for uttering the same.

Since, therefore, the indictment is in the form authorized by the Statutes of Massachusetts, and does not violate any of the provisions of the Fourteenth Amendment, the decision of the Supreme Judicial Court of Massachusetts as to the sufficiency thereof is final. Merely technical objections to the form of an indictment do not raise any federal question for the consideration of this court. *Caldwell* v. *Texas*, 137 U. S. 692.

Fourth Assignment.

"It appears by the absence from the record of any appearance of counsel, and as a matter of fact is, that the prisoner at his trial was not represented by counsel, nor were his constitutional rights

explained to him by the court, and in consequence thereof said trial was unconstitutional. Article 6, Constitution of the United States. The prisoner declares upon oath, as per enclosed affidavit, that he was unrepresented by counsel at his trial; that he received no assistance from the government in procuring counsel, and by reason of his poverty he was unable to retain counsel; that the law under which he was sentenced is unconstitutional, inasmuch as its enactment was contrary to the provisions of the amendments of the United States Constitution, Article 6, guaranteeing the accused counsel in all criminal prosecutions."

The Sixth Amendment is not applicable to criminal prosecution of a citizen of the United States in the State courts.

Maxwell v. *Dow*, 176 U. S. 581.

Moreover, all that the Sixth Amendment guarantees to an accused under any possible construction is "the right . . . to have the assistance of counsel." It does not appear that the plaintiff in error made any request to have counsel assigned him, which was denied. If he had the right to demand the assistance of counsel, he would waive it, and apparently he did. It cannot be said that the Sixth Amendment imposed upon the Superior Court the duty of assigning him counsel, without notice from him that he desired the assistance of counsel.

Nor is there any provision in the Constitution of Massachusetts, or in the statutes thereof, requiring the court to assign counsel to accused persons. The only statute relating to the matter is one providing that upon an indictment for a capital crime the court may assign counsel.

Mass. Pub. Sts., c. 150, § 19.
Conant v. *Burnham*, 133 Mass. 503, 506.

Fifth Assignment.

"That the law and *sentence* under which the defendant was sentenced is unconstitutional, inasmuch as its enactment is contrary to a provision of Article 8 of Amendments, United States Constitu-

tion, in that the punishment inflicted was a cruel and unusual punishment."

Article 8 of the Amendments and the Constitution of the United States is not applicable to proceedings in State courts.

In re Kemmler, 136 U. S. 436, 446.

Moreover, the sentence was neither unusual nor cruel, as sentences go. The plaintiff in error might have been sentenced to imprisonment in the State Prison for a term of forty years, under Pub. Sts., c. 204, § § 1 and 2, if the charges as to the former convictions and imprisonment had been omitted from the indictment.

See *Moore* v. *Missouri*, 159 U. S. 673.

Nor can it be said to be unusual or cruel for the court to pronounce a man to be an habitual criminal, who clearly is one.

Sixth Assignment.

"That the said sentence is unconstitutional, inasmuch as its enactment is contrary to the provision of Article 4, section 2, United States Constitution, and the Eighth and Fourteenth Amendments thereof."

Under this assignment the plaintiff in error may contend that he has been deprived of his liberty without due process of law. But, even if such a contention is fairly open to argument, which the defendant in error does not admit, yet it is respectfully submitted that it cannot prevail. The agreed facts, if material, show that the rights of the plaintiff in error were carefully guarded and explained to him by the court at every stage of the proceedings during his trial. The fact that the presiding judge omitted to instruct the jury as to the habitual criminal charge until after they had returned their verdict on the counts for forging and uttering, and that he then instructed them and they retired and later returned that the plaintiff in error was guilty of that part of the indictment, did not work any denial of due process of law in his behalf. He could not have

prevailed upon a bill of exceptions, if he had taken an exception to that proceeding, which he did not.

Pritchard v. *Hennessey*, 1 Gray, 294.
Florence Sewing Machine Co. v. *Grover & Baker Sewing Machine Co.*, 110 Mass. 70, 82.
Nichols v. *Munsel*, 115 Mass. 567.
Commonwealth v. *Carrington*, 116 Mass. 37.
Mason v. *Massa*, 122 Mass. 477.
Brown v. *Dean*, 123 Mass. 254.
Kenney v. *Habich*, 137 Mass. 421.

All the proceedings at his trial, therefore, were in strict accordance with the established usage and practice of the State, were reasonable in their nature, and did not work any denial of the fundamental rights of the plaintiff in error as a citizen of the State or of the United States.

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Hurtado v. *California*, 110 U. S. 516, 537.
Hodgson v. *Vermont*, 168 U. S. 262, 272, 273.

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. . . . The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century, and make such changes as may be necessary."

Brown v. *New Jersey*, 175 U. S. 172, 175.

See also

In re Kemmler, 136 U. S. 436, 448, 449.
In re Converse, 137 U. S. 624.

It was suggested by counsel for the plaintiff in error in his argument before the Supreme Judicial Court of Massachusetts that the habitual criminal act of 1887 deprived the plaintiff in error of the equal protection of the laws, because it did not include within its terms those persons who had committed one crime in each of two other States of the United States and been imprisoned three years in each such State therefor. That is to say, if some other person who had been previously convicted once in New Hampshire and once in New York and committed for the term of three years in each State, had been convicted of felony in Massachusetts, he could not be punished as an habitual criminal under the statue.

The objection does not go to the reasonableness of the classification which includes the plaintiff in error, but to the reasonableness of another classification based upon two convictions had outside of Massachusetts but which does not include two convictions had in two States outside of Massachusetts.

The statute of 1887 subjects three classes of old offenders to increased punishment upon their third conviction, to wit: —

1. Persons who have been convicted twice in Massachusetts.

2. Persons who have been convicted once in Massachusetts and once in some other State.

3. Persons who have been convicted twice in one other State.

The plaintiff in error is of the second class, and he is entitled to receive and does receive from the State the same protection that all other persons of his class receive. Every person who has offended once against the laws of some other State and once against the laws of Massachusetts, and been committed for the required length of time on each conviction, is liable to punishment as an habitual criminal upon conviction of felony in Massachusetts. And the theory of that classification is reasonable.

The State might have provided that a person should be liable to the same aggravated punishment as was imposed upon the plaintiff in error, upon a second conviction in Massachusetts, without regard to whether he had been convicted at all in some other State.

Moore v. *Missouri*, 159 U. S. 673.

The fact that it did not make such a provision might have worked to the advantage of the plaintiff in error if he had never been convicted in New Hampshire, for then he could not have been subjected to punishment as an habitual criminal. That the State is more merciful, and does not aggravate punishment unless a person has been convicted once at least therein and once in some other State, cannot have the effect of rendering the statute unconstitutional, as to this plaintiff in error at least. If he were a person who had never offended against the laws of Massachusetts before, but had offended against the laws of New Hampshire twice, so as to bring him within the third class mentioned in the statute, he might have some ground for contending that he did not receive the same protection from the State of Massachusetts that some other person received who had been twice convicted and imprisoned before outside her jurisdiction. But no such objection is open to him now. He is an old offender against the laws of Massachusetts, and he is treated like all other old offenders of his class. The fact that the State attempts to subject another class of old offenders to the aggravated punishment, and possibly does not include all old offenders who fall within that class, does not raise any constitutional question of which he can take advantage in this proceeding. He might as well say that he should not be punished as an old offender, because another man, who had been convicted and imprisoned twice in Mexico, could not be so punished.

If the State may provide that a person shall be punished more severely upon a second conviction, it clearly has the right to provide that he shall be punished more severely upon a third conviction, even though one of the former convictions was had in some other State of the United States. The plaintiff in error cannot complain that he is denied the equal protection of the law because he had been convicted only once in Massachusetts, while persons who have never been convicted elsewhere must have been convicted twice in Massachusetts to be subjected to aggravated punishment on their third conviction under the statute. He had offended before against the laws of Massachusetts, and also against the laws of New Hampshire. To say that Massachusetts could not take into consid-

eration his offence in New Hampshire, and inflict the same punishment upon him that it would inflict upon another person who had offended against the laws of Massachusetts twice before, is to carry the equal protection provision of the Fourteenth Amendment to an absurd limit. Every system of punishments would be open to successful attack under it. Even the three-years provision of this statute would be objectionable. Why should a person who had been twice committed for terms of three years each be more severely punished on a third conviction than another who had been twice committed for terms of two years and three hundred and sixty-four days each? Why should women receive the same punishment as men for first offences? It might be contended that they usually have more excuse for committing their first offence than men have.

The fact is that every system of punishment must be more or less arbitrary. The State must divide criminals into classes in a more or less arbitrary manner. It is beyond the power of organized society to mete out absolute equality of punishment for the same degree of criminality in all cases. But it is well settled that the Fourteenth Amendment does not pretend to limit the States in their jurisdiction, so long as they classify criminality upon a reasonable theory, and do not deprive one offender of the same protection that other offenders of his class are entitled to receive.

Pace v. *Alabama*, 106 U. S. 583.

The fact that the statute attempts to include within its terms another class of persons who have been convicted twice outside of Massachusetts, and possibly does not include all who may fall within that class, does not render it unconstitutional as to those classes that it does include fully. If it is unconstitutional as to this the plaintiff in error, it is unconstitutional a to persons who have been convicted twice before in Massachusetts. There is no middle ground. But it is well settled that "where a statute has been passed by the Legislature, under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all

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other parts of the act, not obnoxious to the same objection, will be held valid and have the force of law."

Fisher v. *McGirr*, 1 Gray, 1, 21.
Warren v. *Charlestown*, 2 Gray, 84, 98.
Commonwealth v. *Clapp*, 5 Gray, 97, 100.
Commonwealth v. *Hutchins*, 5 Gray, 482, 485.

If, therefore, the statute is unconstitutional as to those persons who clearly fall within its third class, because it does not include in that class all persons who have been convicted twice before outside of Massachusetts, the attempt at a third classification can be treated as a nullity without in any way invalidating the remainder of the act.

Seventh Assignment.

"That the law under which the prisoner was sentenced — St. 1887, c. 435 — is unconstitutional, inasmuch as its enactment is contrary to the provision of Article 1, section 9, of the United States Constitution, which declares that no *ex post facto* laws shall be enacted."

The statute in question is not an *ex post facto* law; it applies only to punishment for offences committed "after the passage of this act." It could not, therefore, be applicable to any case where the offence was committed before its enactment. Moreover, if it were open to objection as an *ex post facto* law in any case, it is clear that it is not open to that objection in this case. Neither the offence for which the plaintiff in error was convicted, nor the former offences which went to aggravate his punishment, were committed before the enactment of the statute. A law is not *ex post facto* as to any particular offence, if enacted before the commission of that offence.

Kring v. *Missouri*, 107 U. S. 221, 225.

The Supreme Judicial Court of Massachusetts has decided that the statute is not *ex post facto*, although the two offences which went to aggravate the punishment of the accused were committed before its enactment, the offence for which he was convicted having been committed afterwards.

Sturtevant v. *Commonwealth*, 158 Mass. 598.

Eighth Assignment.

"That the law under which the prisoner was sentenced — St. 1887, c. 435 — is unconstitutional, inasmuch as its enactment is contrary to the provision of Article 5 of the United States Constitution, which declares that no man shall be put in jeopardy twice for the same offence, which appears by the court taking jurisdiction of the crime committed and expiated in New Hampshire. The prisoner's sworn affidavit, annexed herewith, states that after the judge's charge upon the whole indictment the jury returned a verdict of guilty upon the four counts, as appears by the record, but said nothing in his charge on the habitual-criminal count; that when the jury were asked by the clerk what they had to say on the habitual-criminal count, the judge arose and stated that he had forgotten to charge them upon the habitual-criminal count, and then proceeded to instruct them upon that count, and the jury again retired and returned for the second time, bringing in a verdict of guilty on the habitual-criminal count; that this whole procedure was irregular, prejudicial and unconstitutional, and that the prisoner was unable by lack of counsel to take exceptions to these facts."

That the plaintiff in error was not twice put in jeopardy for the same offence is conclusively settled by *Moore* v. *Missouri*, 159 U. S. 673.

The remaining allegations (if any) are fully considered in the discussion of the first, second and third assignments of error, *supra*.

Ninth Assignment.

"The prisoner waives no rights which may not be stated in detail here, and which may be apparent on the record, under the Constitution of the United States and Amendments thereof."

This is not an assignment of error. The contrary rather.

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